Usra Tampi (M) Sdn Bhd v MBf Property Trust Management Bhd

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W-02-843-9 OF 1999
MOHD SAARI, PS GILL AND RICHARD MALANJUM JJCA
22 MAY 2003

Contract *— Sale and purchase of land — Contingent contract — Sale of land subject to consent of State Authority — Defendant failed to apply for consent from State Authority for transfer of land — Whether plaintiff entitled to refund of deposit*

Contract *— Sale and purchase of land — Contingent contract — Sale of land subject to consent of State Authority and FIC approval — Defendant failed to apply for consent of State Authority — Plaintiff failed to apply for FIC approval — Whether failure by plaintiff to apply for FIC approval was of any consequence*

The plaintiff/respondent and the defendant/appellant entered into an agreement whereby the defendant undertook to procure for the plaintiff land held under HS(D) 98505, PT 719, Seksyen 16, Lot 2, Jalan 16/6, Bandar Shah Alam ('the said land'). After execution of the agreement, the plaintiff paid a deposit of RM2,250,000, which amounted to 10% of the purchase price. The title of the said land was subject to restriction in interest, in that the land could not be, inter alia, transferred unless the consent of the State Authority was obtained. One of the conditions precedent in the agreement was that the defendant was required to apply and obtain the written consent from the State Authority for the said land to be transferred to the plaintiff and under the agreement, all the conditions precedent must be fulfilled within nine months from the date of the agreement. The defendant failed to apply to the State Authority for written consent to transfer the said land to the plaintiff. In the court below, the plaintiff applied for summary judgment under O 14 of the Rules of the High Court 1980 for refund of the deposit paid to the defendant. The learned trial judge entered judgment for the plaintiff, hence this appeal by the defendant. The main thrust of the defendant's case was that it was entitled to invoke cl 20 of the agreement to forfeit the deposit on the ground that plaintiff had failed to apply for FIC approval pursuant to cl 2(1)(ii) of the agreement.

Held, dismissing the appeal:

(1) The defendant's failure in obtaining written consent from the State Authority within the stipulated period attracted the operation of cl 4 of the agreement, which entitled the plaintiff for refund of the deposit (see p 388G–H); *National Land Finance Co-operative Society Ltd v Sharidal Sdn Bhd* [1983] 2 MLJ 211 followed.

(2) It was true that plaintiff had failed to apply for FIC approval but even if such application were made and approval obtained, the

transfer of the said land to the plaintiff could still not be effected as the prior consent of the State Authority was not obtained. Hence, the failure by the plaintiff to apply for FIC approval was of no consequence (see pp 388H–389A).

(3) There was no triable issue which merited this case to go for full trial (see p 389A).

[Bahasa Malaysia summary

Plaintiff/responden dan defendan/perayu telah memasuki satu perjanjian di mana defendan telah berusaha untuk mendapatkan untuk plaintif tanah yang dipegang di bawah HS(D) 98505, PT 719, Seksyen 16, Lot 2, Jalan 16/6, Bandar Shah Alam ('tanah tersebut'). Selepas penyempurnaan perjanjian tersebut, plaintif telah membayar deposit RM2,250,000, yang merupakan 10% daripada jumlah harga belian. Hak milik tanah tersebut tertakluk kepada sekatan kepentingan, di mana tanah tersebut tidak boleh, antara lain, memindahmilik kecuali persetujuan Pihak Berkuasa Negeri diperolehi. Salah satu pra syarat dalam perjanjian tersebut adalah di mana defendan dikehendaki memohon dan mendapatkan persetujuan bertulis daripada Pihak Berkuasa Negeri untuk tanah tersebut dipindahmilik kepada plaintif dan di bawah perjanjian tersebut, kesemua pra syarat-pra syarat hendaklah dipenuhi dalam tempoh sembilan bulan dari tarikh perjanjian tersebut. Defendan telah gagal untuk memohon kepada Pihak Berkuasa Negeri untuk persetujuan bertulis memindahmilik tanah tersebut kepada plaintif. Di mahkamah bawahan, plaintif telah memohon untuk penghakiman terus di bawah A 14 Kaedah-Kaedah Mahkamah Tinggi 1980 untuk dikembalikan deposit yang telah dibayar kepada defendan. Hakim perbicaraan yang bijaksana telah memasuki penghakiman bagi pihak plaintiff, justeru itu rayuan ini oleh defendan. Inti pati utama kes defendan adalah ia berhak untuk menggunakan fasal 20 perjanjian untuk mengambil deposit tersebut atas alasan bahawa plaintif telah gagal untuk memohon kelulusan menurut fasal 2(1)(ii) perjanjian tersebut.

Diputuskan, menolak rayuan tersebut:

(1) Kegagalan defendan mendapatkan persetujuan bertulis daripada Pihak Berkuasa Negeri dalam tempoh yang ditetapkan menarik operasi fasal 4 perjanjian tersebut, yang memberi hak kepada plaintif untuk mendapat balik deposit tersebut (lihat ms 388G–H); *National Land Finance Co-operative Society Ltd v Sharidal Sdn Bhd* [1983] 2 MLJ 211 diikut.

(2) Adalah benar plaintif telah gagal untuk memohon kelulusan FIC tetapi walaupun permohonan sedemikian dibuat dan kelulusan diberikan, pindahmilik tanah tersebut kepada plaintif tidak boleh dilaksanakan kerana persetujuan daripada Pihak Berkuasa

A Negeri masih belum diperolehi. Justeru itu, kegagalan oleh plaintif untuk memohon kelulusan FIC tidak penting (lihat ms 388H–389A).

(3) Tidak terdapat apa-apa persoalan yang perlu dibicarakan yang memeritkan kes ini ke perbicaraan penuh (lihat ms 389A).]

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Notes

For cases on contingent contracts, see 3 *Mallal's Digest* (4th Ed, 2000 Reissue) para 3619.

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Cases referred to

National Land Finance Co-operative Society Ltd v Sharidal Sdn Bhd [1983] 2 MLJ 211 (folld)

D

Legislation referred to

Rules of the High Court 1980 O 14

Appeal from: Suit No MT1–22–701 of 1998 (High Court, Shah Alam)

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Stanley KW Chang (*CH Loh* with him) (*Stanley Chang & Partners*) for the appellant.

Alvin John (*Ismail Mohd Arifin* with him) (*Rashid & Lee*) for the respondent.

F **Mohd Saari JCA** (delivering judgment of the court): In the court below, the respondent ('the plaintiff') applied for summary judgment under O 14 RHC 1980 for refund of deposit. The learned trial judge entered judgment for the plaintiff, hence this appeal by the appellant ('defendant').

The gist of the plaintiff's case was that on 13 July 1996, the plaintiff and the defendant entered into an agreement whereby the defendant undertook G to procure for the plaintiff land held under HS(D) 98505, PT 719, Seksyen 16, Lot 2, Jalan 16/6, Bandar Shah Alam (hereinafter referred to as 'the said land'). As consideration, the plaintiff would pay the defendant purchase price of RM25,500,000. After execution of the agreement, the plaintiff paid deposit of RM2,250,000.

H It is to be noted that the title of the said land was subject to restriction in interest, which read as follows:

> Tanah ini tidak boleh dijual, dipajak, digadai atau dipindahmilik dengan apacara sekalipun melainkan dengan kebenaran Pihak Berkuasa Negeri.

I The agreement was subject to a number of conditions precedent. One of the conditions precedent was that the defendant was required to apply and obtain written consent from the State Authority for the said land to be transferred to the plaintiff.

Under the agreement, all conditions precedent must be fulfilled within a period of nine months from the date of the agreement. The parties have not agreed on extension on time after expiry of nine months, although the plaintiff had approached the defendant for extension of time.

Reference was made to defendant's letter to PKNS dated 7 August 1996 (p 91 of AR) wherein it was proposed that PKNS transfer the said land direct to the plaintiff. In response as contained in letter dated 14 September 1996 (p 92 of AR), PKNS disagreed with the defendant's proposal but agreed to transfer the said land to the defendant. However, the fact remained that the defendant had failed to apply or at all to the State Authority for written consent to transfer the said land to the plaintiff. Clearly, the defendant had failed to fulfil the condition precedent as provided under cl 2 (1)(i) of the agreement.

As to the law on contingent contract, we can do no better than to refer to Federal Court case of *National Land Finance Co-operative Society Ltd v Sharidal Sdn Bhd* [1983] 2 MLJ 211 at p 218, where Salleh Abas CJ (as he then was) said:

> It is therefore obvious that the parties have entered into a contract of sale contingent upon the approval of the transaction by the FIC over which the parties had no control. There was no promise, nor guarantee that such approval would be given. Such a condition, in our judgment, is more than a mere essential stipulation of the contract, a breach of which entitles an innocent party to regard itself as discharged from further performance and to sue for damages. It is, however, a condition which is known in the law of contract as a contingent condition, the effect which is that a contract shall not take effect unless and until the condition is fulfilled. (see *Trans Trust SPRL v Emerton; Bush v Property and Bloodstock Ltd* — per Sachs, LJ. Until the FIC approval was given liability for further performance remained unenforceable, i.e. suspended although neither the respondents nor the appellants could resile from it until it could be definitely ascertained that the condition could not be fulfilled. This is the effect laid down by s 33 (a) of the Contracts Act.

The learned Chief Justice went on to say on the same page:

> As the approval in this case was refused it means that contingent event becomes impossible and the agreement therefore becomes void in accordance with s 33(b) of the Contracts Act ...

On the authority of the abovementioned case, upon failure of the defendant in obtaining written consent from the State Authority within the stipulated period, such failure would attract the operation of cl 4 of the agreement, which entitled the plaintiff for refund of the deposit.

The main thrust of the defendant's case was that the defendant was entitled to invoke cl 20 of the agreement which enable defendant to forfeit the deposit on the ground that plaintiff had failed to apply for FIC approval pursuant to cl 2(1)(ii) of the same. It is true that plaintiff had failed to make such application. Our perspective of the case was that even if such application was made and approval obtained, still the transfer of the said land to the plaintiff could not be effected as prior consent of the State

A Authority was not obtained. Hence, in our view, failure by plaintiff to apply for FIC approval was of no consequence.

From our scrutiny of the affidavit evidences and in the light of our finding as set out herein, we hold that there is no triable issue which merit this case to go for full trial. Thus, we agree with the finding, of the learned trial judge:

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> Berdasarkan isu-isu yang plaintif telah bangkitkan dalam kes ini, kes ini sesuai untuk Penghakiman Terus kerana isu 'Kebenaran Bertulis Pihak Berkuasa Negeri atau PKNS adalah satu persoalan undang-undang yang boleh ditentukan menerusi authority-authoriti sahaja. Isu fakta dalam kes ini adalah samada defendan telah memohon kebenaran pihak yang relevan untuk proses
> C pindahmilik harta tersebut dan isu ini boleh ditentukan daripada dokumen-dokumen yang telah difailkan oleh plaintif dan defendan dalam kes ini, dan dokumen-dokumen tersebut mengandungi fakta-fakta yang jelas dan tidak memerlukan satu pendengaran lisan.

In the premise and for reasons abovestated, we dismiss the appeal with
D costs. We order the deposit to be paid to the plaintiff towards the account of taxed costs.

Appeal dismissed.

Reported by Lim Lee Na

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